

1 Howard Ross Cabot, Bar #006669  
2 Christopher S. Coleman, Bar #018287  
3 Jacob C. Robertson, Bar #024763  
4 PERKINS COIE BROWN & BAIN P.A.  
5 2901 North Central Avenue, Suite 2000  
6 Phoenix, Arizona 85012-2788  
7 Telephone: 602.351.8000  
8 Facsimile: 602.648.7000  
9 HCabot@perkinscoie.com  
10 CColeman@perkinscoie.com  
JRobertson@perkinscoie.com

11 Attorneys for Defendants  
12 *The Vanguard Group, Inc. and Vanguard*  
13 *Marketing Corporation*

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

Barbara Borchers and Jerald S. Chesler, as  
Trustee of The Betty D. Olson Revocable  
Trust, and The Olson Living Trust,

Plaintiffs,

v.

The Vanguard Group, Inc. and Vanguard  
Marketing Corporation,

Defendants.

No. 08-02138-PHX-ROS

**ANSWER TO FIRST AMENDED  
COMPLAINT**

Defendants The Vanguard Group, Inc. and Vanguard Marketing Corporation (collectively, "Vanguard") respond to the allegations in Plaintiffs Barbara Borchers and Jerald S. Chesler's Complaint as follows:

1. Vanguard states that it lacks knowledge sufficient to form a belief as to the truth of the allegations of Paragraph 1, and on that basis denies those allegations.
2. Vanguard states that it lacks knowledge sufficient to form a belief as to the

truth of the allegations of Paragraph 2, and on that basis denies those allegations.

3. The Vanguard Group, Inc. and Vanguard Marketing Corporation admit that they are incorporated in Pennsylvania, that they are authorized to conduct business in Arizona, and that they conduct business in Arizona. Vanguard states that the remaining allegations of Paragraph 3 are vague, and on that basis deny the remaining allegations of Paragraph 3.

4. Vanguard states that the Olson Living Trust opened and maintained certain accounts with The Vanguard Group. Vanguard denies the remaining allegations of Paragraph 4.

5. Vanguard states that it lacks knowledge sufficient to form a belief as to the truth of the allegations of Paragraph 5, and on that basis denies those allegations. To the extent that the allegations of Paragraph 5 are intended or have the effect of alleging any wrongful conduct on the part of Vanguard, any such allegations are expressly denied.

6. Vanguard denies the allegations of Paragraph 6.

7. Vanguard denies the allegations of Paragraph 7.

8. Vanguard denies each and every allegation that is not specifically admitted in paragraphs 1-7 above.

## **Affirmative Defenses**

Vanguard states the following defenses to the causes of action asserted in the Complaint without assuming the burden of proof where such a burden is otherwise on Plaintiffs pursuant to applicable substantive procedural law. In addition, Vanguard notes that Plaintiffs fail to identify any cognizable cause(s) of action in the First Amended Complaint, and Vanguard is therefore not on notice of any causes of action that Plaintiffs may intend to have alleged against Vanguard. As a result, Vanguard reserves the right to assert additional affirmative defenses as discovery proceeds in this matter.

A. Plaintiffs' First Amended Complaint fails to state a claim upon which relief

1 may be granted.

2       B. Plaintiffs lack standing to assert claims against Vanguard.

3       C. Plaintiffs' claims are barred, in whole or in part, by the applicable statute(s)  
4 of limitations and/or statutes of repose.

5       D. Plaintiffs' claims against Vanguard are barred because Plaintiffs were not  
6 injured by reason of any action by Vanguard.

7       E. Plaintiffs' claims are barred in whole or in part by the doctrines of laches  
8 and unclean hands.

9       F. Plaintiffs' claims are barred in whole or in part under Arizona's Uniform  
10 Contribution Among Tortfeasors Act, A.R.S. § 12-2501, *et seq.* because any injury or  
11 damages allegedly sustained by Plaintiffs were caused by or contributed to by Plaintiffs  
12 themselves and/or other parties at fault and therefore should be apportioned to the  
13 Plaintiffs and such other parties at fault.

14       G. Plaintiffs' claims are barred in whole or in part because Plaintiffs' claimed  
15 injuries and damages were not legally or proximately caused by any acts or omissions of  
16 Vanguard and/or were caused, if at all, by the conduct of third parties including, without  
17 limitation, the prior, intervening or superseding conduct of such third parties.

18       H. Plaintiffs' claims are barred, in whole or in part, by Plaintiffs' failure to  
19 mitigate damages and/or failure to take necessary steps to avoid preventable  
20 consequences.

21       I. Plaintiffs' claims are barred, in whole or in part, by the applicable defenses  
22 in Article 4, section 406 of the Uniform Commercial Code.

23       WHEREFORE, Vanguard requests that the Plaintiffs take nothing by their First  
24 Amended Complaint, and that Vanguard be awarded judgment in this action in its favor,  
25 its reasonable attorneys' fees and costs, and such other relief as the Court deems  
26 appropriate.

1 Dated: February 18, 2010

2

3 **PERKINS COIE BROWN & BAIN P.A.**

4

5 By:/s/ Jacob C. Robertson

6 Howard Ross Cabot, Bar #006669  
7 Jacob C. Robertson, Bar #024763  
8 2901 North Central Avenue  
9 Suite 2000  
10 Phoenix, Arizona 85012-2788  
11 Telephone: 602.351.8000  
12 Facsimile: 602.648.7000  
13 HCabot@perkinscoie.com  
14 JRobertson@perkinscoie.com

15 Attorneys for Defendants

16 *The Vanguard Group, Inc. and Vanguard*  
17 *Marketing Corporation*

## **CERTIFICATE OF SERVICE**

I hereby certify that on February 18, 2010, I electronically transmitted the attached documents to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant(s):

Philip J. Nathanson  
The Nathanson Law Firm  
8765 East Bell Road - Suite 110  
Scottsdale, Arizona 85260  
[philip@nathanlawfirm.com](mailto:philip@nathanlawfirm.com)  
Attorney for Plaintiffs

s/ Indy Fitzgerald

LEGAL17655629.1